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BEFORE THE ARIZONA CORPORATION COMMISSION RECEIVED

ARIZONA CORPORATION )  
COMMISSION, )

COMPLAINANT, )

v. )

GEORGE M. PAPA WATER CO. )

RESPONDENT. )  
\_\_\_\_\_ )

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AZ CORP COMMISSION  
DOCUMENT CONTROLRESPONSE TO COMPLAINT AND  
ORDER TO SHOW CAUSE

Arizona Corporation Commission

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## BACKGROUND

1. This Commission has Ordered the above Respondent to appear and show cause as to why the Certificate of Convenience and Necessity awarded to Respondent on July 10, 1963, pursuant to Decision No. 34674, should not be rescinded.
2. Respondent has been the owner and operator of the public utility known as the George Papa Water Company for 27 years, since July 10, 1963.
3. As a public utility, Papa Water Co. is a hostage, controlled by the fixing of rates by this Corporation Commission, under the Arizona Constitution, Article 15.
4. Papa Water Company is nevertheless strictly entitled to realize a fair and reasonable profit from its operation in the service of the public. See: Simms v. Round Valley Light & Power Co., 80 Ariz 145, 294 P.2d 378; also see: Ariz. Constitution, Article 15, Section 3.
5. In other words, Papa Water Co. can only charge the rates set by this Commission and such rates must allow a fair profit to the utility.
6. This Commission has failed to provide fair and reasonable rates to Papa Water Co. for many years, as shown by the historical and irrefutable losses of record.
7. As per testimony by Hearing Officer Mark Stern in open meeting before this Commission on June 27, 2000, and in open meeting on July 18, 2000, and in the Staff Report dated April 18, 2000, Papa Water lost \$8,249 just on operational costs alone during calendar test year 1999, and the same losses continue today.

8. Not only has Papa Water lost hard dollars in terms of day-to-day operational expenses, but also, Mr. Papa receives a ...ZERO... profit for his valuable Utility Plant in service to the public. This robbery is unconstitutional and illegal.
9. This shocking loss to Papa Water Co. is due to the longstanding negligence and misconduct of this Commission for its failure to perform its statutory duty to provide a fair profit for Papa Water Co., in spite of many pleas for correction.
10. Papa Water Co. filed a timely Application for a rate increase on January 4, 2000. One of the purposes of this Application was so that Papa Water Co. could finally become solvent, and be able to pay its taxes.
11. On February 3, 2000, this Commission granted to Papa Water Co., its "Sufficiency Letter" pursuant to its rate increase application. This letter stated that Papa Water Co. was a Class "D" utility, and according to the law of Arizona Administrative Code R14-2-103, a decision for relief was to be "rendered on or before August 1, 2000" by this Commission.
12. This Commission violated both the above legal timeline and its obligation under the Arizona Constitution to grant timely rate relief to Papa Water Co., in order that Papa Water Company could be solvent.
13. When Papa Water could not pay its delinquent taxes, his utility was seized and transferred to another party on August 23, 2000, three weeks after this Commission should have acted and provided relief for Papa Water Company.
14. Now this Commission is having a hearing to determine if it is justified to remove the Certificate of Convenience and Necessity from Papa under these conditions.
15. Since Papa Water Co. was habitually losing money, it had no ability to attract any buyers, or partners, or investors to salvage such a "red ink" and bankrupt business. The tax lien was actually auctioned and sold for far less money than the full delinquent amount of the tax lien. This is the dire financial condition which this Commission subjugated over Papa Water Co.

#### LEGAL ARGUMENT

16. All during the past 27 years – minute in and minute out -- up until this very moment, Papa Water has provided admirable service to its 260 scattered

residential customers that are served by over nine miles of mainline heavy-duty transmission pipe. The system works very well with a minimum of complaints.

17. It is not a matter of poor service that is the problem. It has instead been a problem of inadequate rates set by this Commission, that has resulted in financial deficits, including the inability to pay taxes, or to make any profit whatsoever from the valuable utility plant in service, contrary to law.
18. This Commission has "singled out" Papa Water Co., by granting much higher rates to neighboring water utility companies, while Papa Water is expected to supply the same high-quality of service -- which it does -- yet this Commission insists on oppressing Papa Water under the line of viability as shown.
19. It cannot be said that because taxes were collected above and beyond the existing rate structure, that therefore the full fault lies with Papa.
20. This argument would only be viable provided this Commission was doing its job to provide a full and proper rate of return and corresponding profit to Papa.
21. Since this Commission did not provide adequate rates to even allow Papa to pay the daily operational expenses -- let alone receive any profit his utility plant -- then the horrible decision of having to choose between paying the taxes, or foregoing other necessities, would never have been an issue.
22. There is a joke in the water utility industry that the only release from the burden of this inept Commission is to deliberately not pay the taxes, so that the company will hopefully be seized, and in this manner cease to be a financial drain on the utility owner. Currently, scores of small water companies are also delinquent on taxes. The problem is, no smart person wants to pick them up.
23. The time has finally come for this Commission to get real and to do its duty so that not only is there an incentive to pay the taxes, but also that small water company owners can make a reasonable profit on the value of their plants. This case is destined to be a historical test of the true leadership of this Commission.
24. This Commission should not rescind Papa's CC & N, but should instead correct its own obvious rate-making deficiencies, in order for Papa to be able to pay his legal debts, including repayment to Mr. Parker, who is the tax lien holder.

25. The alternative is that if Papa loses his utility property due to the shown errors of this Commission, then this Commission is at risk in a court of law for actual and punitive damages plus court costs and attorney fees.
25. This position is consistent with Van Dyke v. Geary, 218 F.111 Aff'd d 244 U.S. 39 (1917), which clarifies that utilities operated as sole proprietorships are under the full jurisdiction of the Arizona Corporation Commission, including the status of ownership and the transfer of utility assets.
26. In other words, this Commission controls whether or not a new prospective owner may assume utility assets and/or a CC & N under all circumstances.
27. Since the circumstances are unjust under which Papa's CC and N is proposed to be rescinded, then said CC & N should not be taken from Papa.
28. This position is also consistent with James P. Paul Water Co. v. Arizona Corporation Commission, 137 Ariz. 426, 671 P.2d 404 (1983) "Once granted, a certificate of convenience and necessity confers upon its holder an exclusive right to provide the relevant service for as long as the grantee can provide adequate service AT REASONABLE RATES".
29. The relevant meaning in the above James P. Paul case supra, is that since the existing rates for the subject utility are unreasonable and the grantee is losing money due to the negligence of this Commission, then this Commission should not award the CC & N to another party, but instead should correct its own error in rates to protect the integrity of the exiting CC & N holder.
30. Since "reasonable rates" are the key as to whether or not a CC & N remains with the grantee of a CC & N, coupled with whether or not the existing service is adequate, (here the service is adequate and not in dispute), then the current imposition of unreasonable rates to the detriment of Papa Water Co. constitutes overriding legal reason as to why the CC & N should remain in the possession of Papa, until the correction in rates is made by this Commission.
31. This position of Papa is also consistent with another angle of James P. Paul supra, in that it is "in the public interest" for Papa to retain his CC & N, and for this Commission instead to make correct and to grant a profit for Papa.

32. Failure by this Commission to correct its error in rates for Papa, and to also fail to allow Papa to retain his CC and N, will have an adverse effect on the public interest, because Papa will then have legal grounds to sue this Commission and to receive substantial money from the Arizona General Fund in actual and punitive damages. Such a loss from the General Fund will hurt the public interest, and be avoided if this Commission does its proper duty for Papa.
33. HERE NOW is a "short list" of the accumulated errors of ACC towards Papa.
- A. This Commission has failed to allow Papa Water to even have enough rate income to pay its operational costs.
  - B. This Commission fails to allow Papa to receive any profit income whatsoever for the ownership of his utility, aside from the negative operational costs.
  - C. This Commission has failed to establish correct plant value for the assets of Papa Water. Original Cost figures should not figure into the value whatsoever, even on an "average in" basis and Staff's stated Replacement Cost figures of only \$5.48 per lineal foot for mainline pipe, before depreciation, is less than half of established market value.
  - D. This Commission also victimizes Papa with illegally high 5% depreciation losses that are a further "taking" of Papa's property. During calendar year 1999, ACC itself stated \$12,964 for current depreciation and \$332,898 in ACCUMULATED depreciation. At the correct depreciation figure of 2% instead of 5% as per NARUC standards, then two fifths of \$332,898 for accumulated depreciation should be only \$133,159, for a difference of \$199,739 in current Plant Value. This \$199,739 in plant value simply "vanished" due to such false depreciation calculations.
  - E. At a 11.38% rate of return on Plant Value, this difference of \$199,739 in improperly reduced Plant Value results in a loss of \$22,730.30 of ownership income -- just in 1999 alone. Every year it gets worse.
  - F. ACC wrongfully believes that compensation for this hard dollar loss of \$22,730.30 is somehow achieved by merely adding the \$12,964 in current depreciation for 1999, as a "cost" in the expense column, in order to "pad" expenses and to thus make the "net" income figure artificially "higher".

This smoke and mirrors book-keeping delusion is clearly a hoax. Adding the *current* depreciation figure of \$12,964 to the expense column to inflate present costs is only a ridiculous “voo doo” maneuver and a cruel rip-off to Papa, in light of the corresponding *hard dollar* loss of \$22,730.30 for the same calendar year through the back door.

- G. This Commission illegally failed to grant not only PROPER relief but also TIMELY relief since 1996. Two official timelines were totally obliterated and not acted on at all by ACC, after formal Sufficiency Letters were issued by this Commission relative to dire Rate Relief.
- H. This Commission did not figure or implement correct WIFA Loan structure by trying to have Papa pay for amortization of future plant improvements via a WIFA loan out of Papa’s existing equity contrary to law.<sup>1</sup>
- I. When this error was identified, the ACC Chairman ordered the hearing to be postponed until the next open meeting hearing, so a correction could be prepared by Staff. It never did happen. No corrective amendment resulted, and Papa suffered additional damage both in terms of lost income, illegal abuse of the time line, and even potential total loss of the full utility.

41. The existence of these above irrefutable errors by ACC have legal standing as follows for the protection of Papa, according to Guerin v. American Smelting, \_\_\_ Ariz. \_\_\_, 236 P.2d 684, aka, the “clean hands theory”. (One seeking legal action against another, such as this Commission now seeking to deprive Papa of his CC & N, must first be free from wrongdoing or inexcusable neglect and inattention.) See also: MacRae v. MacRae, \_\_\_ Ariz. \_\_\_, 112 P.2d 213.

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<sup>1</sup> More specifically, Staff determined that \$262,840 of Plant improvements required by ADEQ would cost \$27,676 per year as a rate increase to the customers for 20 years to amortize via a WIFA loan. HOWEVER, Staff refused to add on the books the value of the new improvements to the value of the existing improvements, to thus create the new and combined Plant Value. Consequently, the true rate of return was skewed because artificially high income was factored into artificially low plant value to falsely show that Papa was somehow receiving an acceptable 11.38% POSITIVE Rate of Return. To maintain this target 11.38% rate of return, either both the new plant value AND the new income had to be added to the books, or else neither the new plant value NOR the new income could be added to the books. This failure would result in Papa’s further loss of existing equity. What was further amiss in this case, was that Papa was already losing \$8,249 in red ink anyway, and the first proposal of Staff only compound the loss.

42. Given the plethora of gross errors by this Commission to Papa Water, in the event this Commission rescinds Papa's CC & N under these circumstances, then the Public Interest will be harmed as follows:
43. On the one hand, the public as per the Arizona General Fund will gain the mere \$65,000 which the Parkers paid for the tax lien, but in return, the public will lose in excess of \$500,000, to pay for the actual plant value alone payable to Papa, plus other legal costs, which amount will be sucked out of the same Arizona General Fund, due to the culpable malfeasance of this Commission to Papa, while Papa was under the tyrannical and "inescapable domination" of ACC.
44. This Commission must not rescind Mr. Papa's CC & N, since a rescission of the CC & N must be fair, reasonable and void of unclean hands by this Commission.
45. ACC's erroneous MEMORANDUM requesting rescission cites as follows:
46. Art. 15, Sec, 3 of the Arizona Constitution (as wrongly cited by Staff) is the basis for rescission. To the contrary, what this Section actually says is as follows:

The Corporation Commission shall... prescribe just and reasonable rates and charges to be made and collected, by public service corporations within the State for service rendered therein, and make reasonable rules, regulations, and orders...

The fatal flaw with this case is that ACC has utterly failed to prescribe just and reasonable rates and charges for Papa. Papa has absolutely lost money; gone below the poverty line; and has had to subsidize his system \$8,249 during calendar year 1999 alone. Moreover, Papa has received nothing in terms of any ownership profit from the system. Thus ACC is in gross violation of its constitutional duty to provide reasonable rates. Therefore, it is improper for this Commission to compound the problem by rescinding Papa's CC & N. To the contrary, the CC & N should stay with Papa, and instead, ACC should shape up and correct its own errors so that Papa can enjoy legal viability.

47. ACC also cites A.R.S. s 40-282 (c) as authority to rescind Papa's CC & N. This Statute merely requires a Hearing to determine if such a rescission is justified, and, that the Commission may "refuse" to rescind the CC & N -- if it is not justified -- as is clearly the case here.

48. This Commission has already effected this concept. Three weeks ago, Papa was not able to financially redeem his utility, and it passed to a third-party tax lien holder. HOWEVER, this Commission has ORDERED that the same manager continue to run the system, that was the manager when Papa was the owner.
49. The point is, this Commission has authority to dictate by A.R.S. s 40-282 (c) who retains the system, regardless as to who the supposed "owner" of the assets are.
50. CONSEQUENTLY, Papa's asks that the existing manager (H & H Water Co.), who is currently managing the system, as Ordered by this Commission since Aug. 23, 2000, when the tax lien was not able to be redeemed by Papa, BE EXTENDED TO RUN THE UTILITY UNTIL PAPA CAN BE COMPENSATED, AND THE TAX AMOUNT CAN BE REPAYED TO THE TAX LIEN HOLDER FROM PAPA'S OWN RESTORED EQUITY -- THROUGH CORRECT RATE STRUCTURE -- AS IS REQUIRED BY LAW.
51. This Commission also cites A.R.S. s 40-361 as the authority to deprive Papa of his CC & N. The primary thrust of A.R.S. s 40-361 is as follows:

Charges by public service corporations (are) required to be just and reasonable; ... rules and regulations relating to charges or service required to be just and reasonable.

- A. Charges demanded or received by a public service corporation for any commodity or service shall be just and reasonable. Every unjust or unreasonable charge demanded or received is prohibited and unlawful.

It is abundantly clear that the rates and charges imposed by this Commission over Papa are unjust and unreasonable. There is no excuse for allowing Papa to have a negative cash flow for years. Therefore, this Commission is unlawful and the failure of this Commission to correct this problem will be a gross regulatory abuse and ample grounds for legal action against this Commission.

52. Finally, this Commission extensively cites James P. Paul Water Company v. Arizona Corporation Commission, 137 Ariz. 426, 671 P. 2d 404. In reality, this citation does not favor the Commission, to the contrary it favors Papa as follows:



53. At issue was whether or not the CC & N of the James P. Paul Water Company should be taken away and awarded to another applicant. The Arizona Supreme Court went out of its way to rule decisively that it should not be taken away.
54. The Arizona Supreme Court cited Application of Trico Electric Cooperative, Inc. 92 Ariz. 373, 377 P.2d 309 (1962) to be key as to whether or not a CC & N should be taken from one party and awarded to another. The paramount rule of law was stated to be whether or not the existing CC & N holder "failed or refused to render satisfactory and adequate service herein, at reasonable rates".
55. Clearly Papa has always provided satisfactory and adequate service, so this is not a problem. If it is a problem, it is the fault of the manager in place over the system, which manager was assigned two years ago by this Commission to run the system, so Papa himself is faultless – regardless.
56. Additionally, the rates are far less than reasonable. The rates are actually illegal and "in the red" as per providing either adequate operating capital, or, any profit to Papa. Thus this Commission is both negligent and contrary to the law.
57. Under these circumstances, there are no grounds to remove the CC & N of Papa.
58. The Supreme Court specifically ruled that the original holder of the CC & N...  
"must be given the opportunity to provide adequate service at a reasonable rate before a portion of its certificate could be deleted. A certificate holder is entitled to that opportunity because providing it with that opportunity serves the public interest. This is necessarily the case in light of Arizona's public policy with respect to public service corporations."
59. For years, Papa has had the CC & N, but Papa has not had the opportunity, to receive adequate rates, and thereby be viable. Therefore, it is contrary to law for this Commission to compound its abuse against Papa, and to further take away Papa's opportunity to serve the public and to also receive adequate rates.
60. The Supreme Court states in James P. Paul, supra, at page 497, as follows:  
If a certificate of convenience and necessity within our system of regulated monopoly means anything, it means that its holder has the right to an opportunity to adequately provide the service it was certified to provide.

Only upon a showing that a certificate holder, presented with a demand for service which is reasonable in light of projected need, has failed to supply such service at a reasonable cost to consumers, can the Commission alter its certificate.<sup>2</sup>

A system (Commission) which did not provide certificate holders with an opportunity to provide adequate service at reasonable rates before deletion of a certificated area could be made would be antithetical to the public interest for several reasons:

First, (inapplicable to this case) Second, (also inapplicable to this case) Third, it fails to reward a public service corporation for taking on the risks and obligations concomittant to certification.

61. If this Commission denies the present CC & N holder (Papa) his proper financial reward for operating a utility system, then the Commission, is in violation of the law, and Papa must not be harmed for the wrongdoing of the Commission.
62. The Supreme Court further ruled that it was irrelevant how much money a third-party CC & N applicant has invested towards acquiring the subject CC & N area. The key is whether or not the original CC & N holder (Papa), is unable or unwilling to provide service at a reasonable rate.
63. Since a reasonable rate, which is necessary to conduct service does not exist, since the system is losing money, then the basis for removing the CC & N from Papa does not exist either. Before the CC & N can be rescended, a reasonable rate to the original CC & N holder must first be restored. Otherwise, chaos will reign in the utility business, and this Commission will have violated all law, statute and decency -- due to negligence and oppression on the part of ACC.
64. In reality regarding this case, there was no business incentive to redeem the tax lien for even 50 cents, given the fact that the system loses money. Who in their right mind would pay anything for a looser utility, that is only a financial drain, with no hope in sight that this Commission would make any timely or proper rate correction, based upon years of historical Commission negligence?
65. The one good thing that may come out of this nightmare, is that now this Commission can plainly see, and hopefully correct, the real hardship it fosters.

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<sup>2</sup> There has never been any failure by Papa to provide any extension or reasonable service.

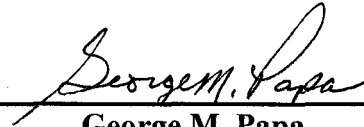
### RELIEF REQUESTED

For good cause shown, Papa requests that this Commission NOT RESCIND Papa's CC & N. To the contrary, Papa requests that he retain his CC & N and that this Commission establish correct rates that will render Papa Water Co. to be viable financially, so that it can pay its debts, including taxes, and receive a true profit.

It is undeniable that since Papa Water Co. lost \$8,249 in operational costs alone during test year 1999, and that no profit whatsoever flowed to Papa since October 1, 1998, when this Commission assigned a new manager to operate the system, that this Commission has victimized Papa and it is unjust that Papa should lose any more substance, including his CC & N, due to further misconduct by ACC.

RESPECTFULLY SUBMITTED this 8<sup>th</sup> day of September, 2000.

By: \_\_\_\_\_

  
George M. Papa